SUPREME COURT OF THE UNITED STATES.

No. 589.

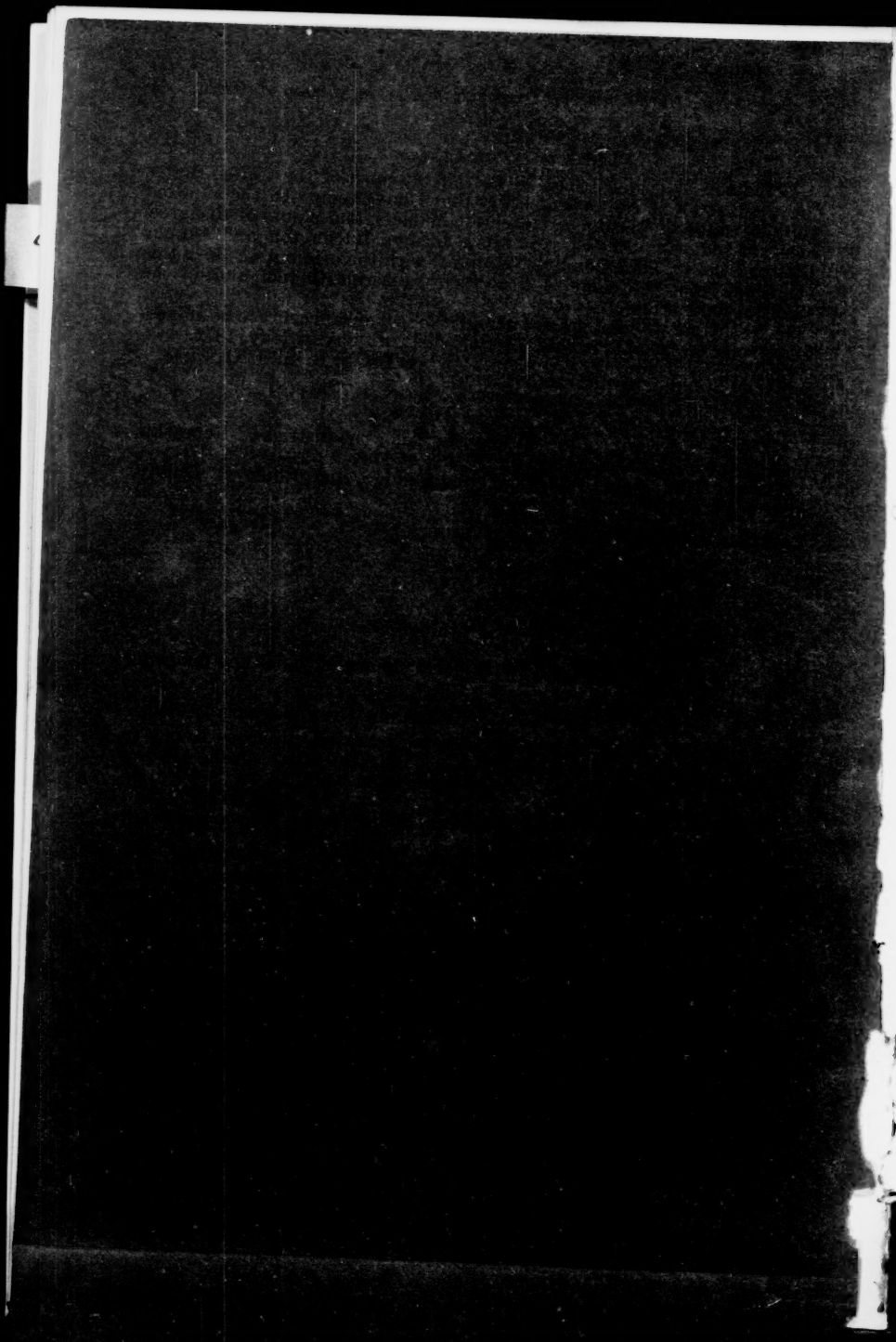
THE CHICAGO, BURLINGTON AND QUINCY RAILROAD COMPANY, PLAINTIFFS,

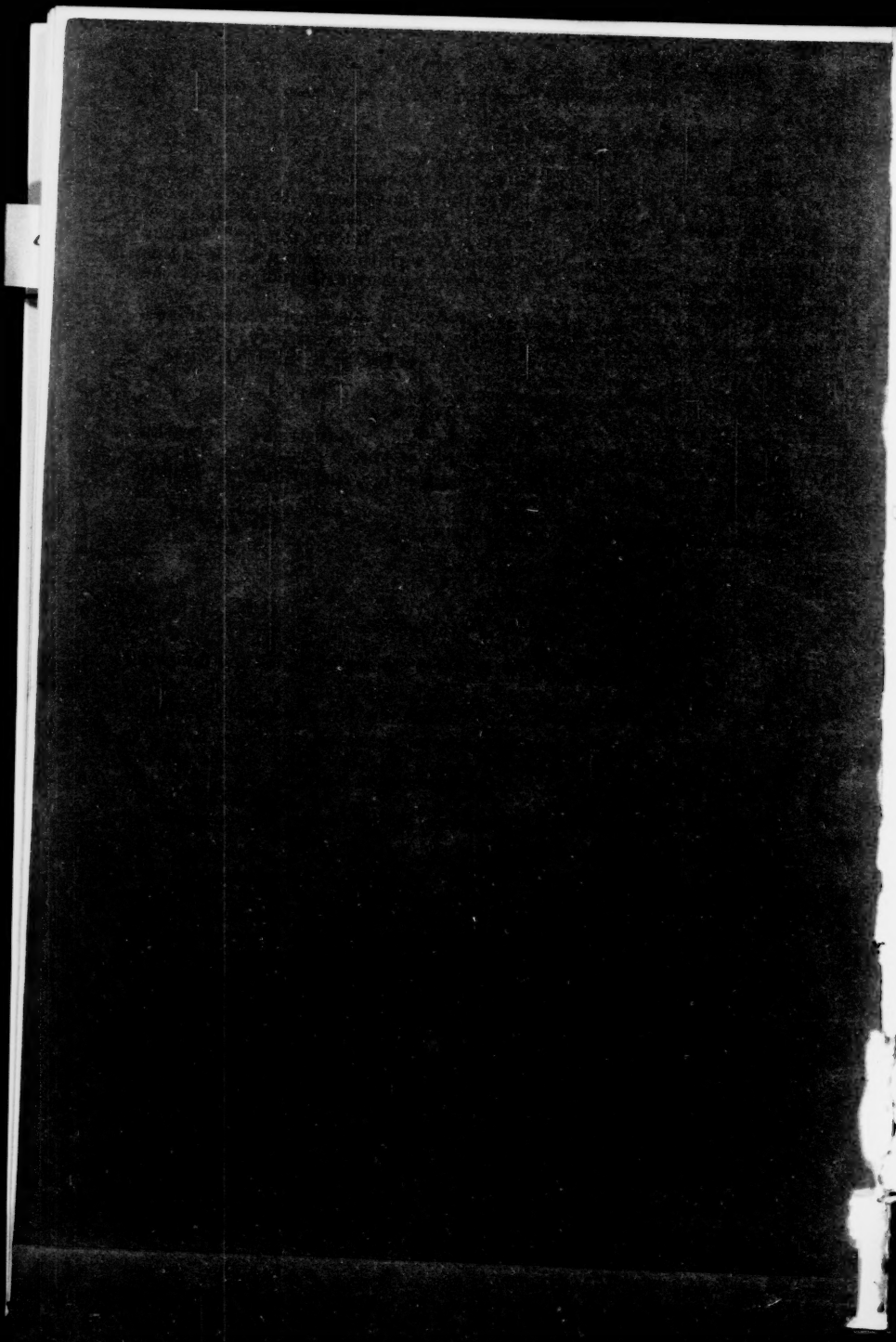
vs.

THE COUNTY OF OTOE.

ON A CERTIFICATE OF DIVISION IN OPINION BETWEEN THE JUDGES OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

FILED DECEMBER 10, 1872.





1 UNITED STATES OF AMERICA,
District of Nebraska, ss:

I, Watson B. Smith, clerk of the circuit court of the United States for the district of Nebraska, certify that I have compared the annexed copy of state of pleadings, statement of facts, and points of disagreement of judges, in the case of the Chicago, Burlington and Quincy Railroad Co. vs. Otoe County, Nebraska, with the original on file in this office, and that the same is a correct transcript thereof, and of the whole of said original.

In testimony whereof I have caused the seal of said court to be affixed, at the city of Omaha, in said district, this 20th day of May, 1872.

[SEAL.] WATSON B. SMITH, *Clerk.*

2 UNITED STATES OF AMERICA,
District of Nebraska:

At a circuit court of the United States for the district of Nebraska, held at the city of Omaha, on the 10 day of May, 1872—

Present Hon. John F. Dillon, circuit judge, and Elmer S. Dundy, district judge.

THE CHICAGO, BURLINGTON AND QUINCY Railroad Co.
vs.
THE COUNTY OF OTOE.

State of the pleadings.

Action on one hundred and thirty-five coupons, of which the following is a copy.

$40.] NEBRASKA CITY, *January* 1, 1870.

The County of Otoe, in the State of Nebraska, promises to pay to the bearer forty dollars, at Broadway Bank, New York, on the 1st day of July, 1870, being for six months' interest on bond No. 1.

A. STOUT,
President Board County Commissioners.

GEORGE R. MCCALLUM, *Clerk.*

These coupons, as the petition alleged, were attached to a like number of bonds of the same date, payable to bearer in twenty years from date, with semi-annual interest, for which those here sued on
3 were the interest first becoming due. The same were issued to the Burlington and Missouri River Railroad Company, and by it negotiated to the plaintiff before maturity, and for value and without notice.

The defendant answered, urging three matters against the plaintiff's claim:

1. That acts of the legislature authorizing counties to issue bonds in aid of railroads are unconstitutional.

2. That these bonds and coupons were not issued according to the laws of the State, because—

(1.) No vote of the people was ever taken on the proposition; and

(2.) The work in aid of which they were made was out of the State.

3. That the bonds were issued to the Burlington and Missouri River Railroad Company, and by it transferred to the plaintiff, with notice of the facts invalidating them.

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(2.) The work in aid of which they were made was out of the State.

3. That the bonds were issued to the Burlington and Missouri River Railroad Company, and by it transferred to the plaintiff, with notice of the facts invalidating them.

This notice is charged to have been actual, and also to have been derived from the fact that a majority of the stockholders in the two companies are the same persons. The plaintiff in its replication denies these allegations, and pleading an act of the legislature of the State of Nebraska, approved February 15, 1869, hereinafter entitled.

4 On the trial an agreed statement of facts, and the several papers, and acts of the State legislature hereinafter mentioned, were presented to the said judges, and a jury was waived, and the cause submitted to the said judges for their judgment. The said agreed statement of facts, and the said papers and acts are hereto annexed.

And on the said trial it occurred as a question whether or not the act in the agreed statement of facts entitled, approved February 15, 1869, authorizing the county to issue bonds in aid of a railroad outside of the State, conflicts with the constitution of the State of Nebraska, and also the further question, whether the county commissioners of Otoe County under the act of February 15, 1869, could lawfully issue the bonds from which the coupons in suit were detached without the proposition to vote the bonds for the purpose indicated, and also a tax to pay the same, being or having been submitted to a vote of the people of the county as provided by the act of the territorial legislature of Nebraska, approved January 1, 1861; on which questions and each of them the opinion of the said judges were opposed.

Whereupon, upon motion of the plaintiff, by its counsel, the said two points on which the said disagreement hath happened may

5 during the term be stated by the said judges, and be certified, according to the request of the counsel for the plaintiff, to the Supreme Court to be finally decided.

It is ordered that the foregoing state of the pleadings and statement of facts, which is made under the direction of the judges, be certified according to the said request and the law in that case made and provided, and that the above two several questions and points be also, in like manner, so certified, as the points upon which the said disagreement hath occurred.

JNO. F. DILLON. [SEAL.]
ELMER S. DUNDY. [SEAL.]
Judges.

(Indorsed:) No. 48. B. U. S. circuit court, dist. of Nebraska. The Chicago and Burlington and Quincy Railroad Co. vs. The County of Otoe. Filed May 10th, 1872. Watson B. Smith, clerk.

6 The parties have made an agreed statement of facts, which is as follows:

1. That the county-clerk of Otoe County caused to be published a notice in the following words:

"In pursuance of the authority in me vested by law, I hereby call a meeting of the commissioners of Otoe County, to be held at their usual place of meeting in Nebraska City, of said county, on Saturday, the 24th day of February, A. D. 1866, to take into consideration the question of submitting to the people of said county the issuance of the bonds of said county, not exceeding $200,000 in amount, to be used in procuring to said county an eastern railroad-connection.

(Signed) "ELISHA BENNETT, *Co. Clerk.*"

2. In pursuance of said notice the county-commissioners met, and ordered an election accordingly, to be held on the 17th day of March, 1866; and said election was held on said day, and at the same 1,362

votes were cast in favor of said proposition, and 201 votes were against the same.

The order of the said commissioners for this election was as follows:

"It is ordered that an election be held on the 17th day of March, 1866, in and throughout the county of Otoe, N. T., for the pur-
7 pose of ascertaining whether the commissioners of Otoe County shall issue bonds not to exceed $200,000, for the purpose of securing an eastern railroad-connection for Nebraska City, N. T."

3. The Council Bluffs and St. Joseph Railroad Company built a railroad from Council Bluffs, in Iowa, to St. Joseph, in Missouri, near Nebraska City, and by order of the county-commissioners, made December 13, 1866, forty thousand dollars of the bonds of said county, so as aforesaid voted for, were, on or about said day, issued to it, and coupons thereof were duly paid up to commencement of this suit. Said bonds were issued to secure an eastern railroad-connection, and the same was secured by way of St. Joseph and by way of Council Bluffs.

4. On the 15th day of February, 1869, the legislature passed an act entitled "An act to authorize the county-commissioners of Otoe County to issue the bonds of said county to the amount of one hundred and fifty thousand dollars to the Burlington and Missouri River Railroad, or any other railroad running east from Nebraska City," which will be found on page 260 of the laws of the 5th session, the draft of which was drawn by the attorney of said Burlington and Missouri River Railroad-Company, and said act is made a part of this stipulation.

8 5. That, on the 23rd day of July, 1869, the board of county-commissioners of said county passed a resolution, a copy of which is hereto annexed, marked Exhibit "A," which was duly ratified by the company.

6. That the said Burlington and Missouri River Railroad-Company duly made to said county the bond in said resolution mentioned, in that behalf of it required, and within the time in that behalf limited in said resolution, built, and has ever since operated said railroad, and performed each and every the stipulations on its part in said resolution contained; and thereafter, and on the 23rd day of July, 1869, said board of county-commissioners passed a resolution directing the county-clerk to deliver to said railroad-company the bonds, with the coupons attached, in the pleadings mentioned, which was by him accordingly done on the 27th day of September, 1869.

There was no vote of the people other than that above mentioned authorising the issue of said bonds to said company.

7. The Burlington and Missouri River Railroad-Company sold and transferred the said bonds, with the coupons attached, for value, and before maturity of any of said coupons, to said plaintiff; that on and before the 1st day of June last, at least one person, and since that day three persons, have been directors in both said company and said plaintiff; but at no time has any person been an officer or a member of the executive committee of both of said companies; and
9 that said plaintiff had no notice of the facts herein stipulated, only as the same may be inferred from the matters stated in this clause: A large number of persons are stockholders in both companies.

8. The Burlington and Missouri River Railroad-Company is a foreign corporation, incorporated under the laws of the State of Iowa, and the plaintiff is a foreign corporation incorporated under the laws of the State of Illinois.

9. The coupons sued on in this action are the same coupons as are

above referred to. Payment thereof has been duly demanded and refused

A. Stout, was at the day of the date, and the day of the making of said bonds and coupons, a member and acting president of the board of county-commissioners, and George R. McCallum was clerk of said county, and their signatures to said bonds and coupons are genuine.

Dated, Omaha, November 10, 1871.

10 An act to authorize the county-commissioners of Otoe County to issue the bonds of said county to the amount of one hundred and fifty thousand dollars to the Burlington and Missouri River Railroad, or any other railroad running east from Nebraska City.

Whereas the qualified electors of the county of Otoe, and State of Nebraska, have heretofore, at an election held for that purpose, authorized the county-commissioners of said county to issue the bonds of said county in payment of stock to any railroad in Fremont County, Iowa, that would secure to Nebraska City an eastern railroad-connection, to the amount of two hundred thousand dollars; and whereas but forty thousand dollars have been issued—

SECTION 1. *Therefore, be it enacted by the legislature of the State of Nebraska*, That said commissioners be, and they are hereby, authorized to issue one hundred and fifty thousand dollars of the bonds aforesaid to the Burlington and Missouri River Railroad-Company, or any other railroad-company that will secure to Nebraska City a direct eastern railroad-connection, as a donation to said railroad-company, on such terms and conditions as may be imposed by said county-commissioners.

Commissioners authorized to issue bonds.

SECTION 2. Said bonds, when so issued, are hereby declared to be binding obligations on said county, and to be governed by the terms and conditions of an act entitled

Said bonds declared binding obligations.

"An act act to enable counties, cities, and precincts to borrow
11 money or to issue bonds to aid in the construction or completion of works of internal improvements in this State, and to legalize bonds already issued for such purpose," approved February, A. D. 1869.

SEC. 3. This act to take effect and be in force from and after its passage.

Approved February 15th, 1869.

12 (Indorsed:) No. 48. B. U. S. circuit court district of Nebraska. The Chicago, Burlington and Quincy Railroad-Company vs. The County of Otoe.

(Indorsement on cover:) No. 589. The Chicago, Burlington and Quincy Railroad Company, plaintiff, vs. The County of Otoe. Nebraska C. C. U. S. Certificate of division. Filed 10 December, 1872.

In the United States Supreme Court.

THE CHICAGO, BURLINGTON AND QUINCY RAILROAD CO.

v

THE COUNTY OF OTOE.

BRIEF AND POINTS FOR THE PLAINTIFF.

This is a certificate of division of opinion between the Judges of the United States Circuit Court for the District of Nebraska.

The action is upon interest coupons detached from 135 bonds issued by the defendant, under an act set out in the certificate, to the Burlington and Missouri River Railroad Company, and by it transferred to the plaintiff. The questions upon which the Judges disagreed were "whether the act in the agreed statement of facts entitled, approved February 15, 1869, authorising the county to issue bonds in aid of a railroad outside of the State conflicts with the constitution of the State of Nebraska, and also the further question whether the County Commissioners of Otoe County, under the act of February 15, 1869, could lawfully

issue the bonds from which the coupons in suit were detached, without the proposition to vote the bonds for the purpose indicated, and also a tax to pay the same being or having been submitted to a vote of the people of the county as provided by the act of the Territorial Legislature of Nebraska, approved January 1, 1861."

The statutes referred to in the questions are attached to this brief.

First Point.

The question of the validity of the bonds generally issued by municipal corporations in Nebraska, in aid of internal improvements, is not open for discussion in this Court.

The Supreme Court of the State has never decided the question one way or the other.

The Supreme Courts of twenty-six States, in over ninety-five cases, have affirmed the validity of such securities. The weight of authority is irresistible.

This Court has repeatedly decided that the power may be conferred by the legislature.

Knox County *v.* Aspinwall, 21 How., 539, 47.
Zabriskie *v.* Railroad Company, 23 Id., 381.
Amey *v.* Mayor, 24 Id., 365, 376.
Gilpecke *v.* Dubuque, 1 Wall, 173.
Mercer County *v.* Hacket, Id. 81.
Meyer *v.* Muscatine, Id. 384.

Second Point.

There is no provision in the Nebraska Constitution, which presents the question in a different aspect from that in which it is regarded in the multitude of cases, above referred to.

The several clauses cited by the defendant's counsel are the following :

> "The property of no person shall be taken for public use without just compensation."
>
> "The credit of the State shall never be given or bound in aid of any individual association or corporation."
>
> "For the purpose of defraying extraordinary expenses the State may contract public debts, but such debts shall never in the aggregate exceed fifty thousand dollars."

Each of these provisions has been the subject of repeated and exhaustive examination and analysis by the Courts in this class of cases, and it is certainly useless to cite the cases.

Under these circumstances we are entirely justified in insisting that "in the absence of any decision of the Supreme Court of a State upon the question of the constitutionality of the legislation authorising municipal indebtedness and taxation in aid of railroad companies, and considering the state of the adjudications upon that subject in the different States, and particularly the course of decision in the Supreme Court of

the United States upon the liability of corporations issuing such bonds, the Court will not hold them unconstitutional." This is the rule laid down in the Eighth Circuit by Mr. Justice Miller and Mr. Circuit Judge Dillon.

> Gilchrist *v.* Little Rock, 1 Dillon, 261.
> Ranlett *v.* Leavenworth, Id. 263 n.
> King *v.* Wilson, Id. 555.

Another clause, not frequently the subject of remark in these cases, may be noticed It is the 20th Section of the Bill of Rights that "all powers not herein delegated remain with the people." But Section 1 of Article II vests plenary legislative power in the General Assembly, so that the power was delegated and therefore did not remain with the people. The same clause is found in the Ohio Constitution, and has been construed according to this view in Baker *v.* Cincinnati, 11 Ohio St., 534, 542.

Third Point.

But it is said that the legislation in question is invalid for reasons outside of the express provisions of the constitution and on three distinct grounds. Let us consider them separately :

1. It is urged that the bonds were not authorised by a vote of the people. Admit this to be so : the act attached to the certificate expressly authorises their issue without a vote, and is valid.

In Thompson *v.* Lee County, 3 Wallace 327, Mr.

Justice Davis, delivering the opinion of this Court, said :

> "The legislature of a State, unless restrained by the organic law, has the right to authorise the municipal corporation to take stock in a railroad or other work of internal improvement, to borrow money to pay for it, and to levy a tax to repay the loan. And this authority may be conferred in such a manner that the objects can be attained either with or without the popular vote."

See, also, Foot *v.* Salem, 14 Allen, (Mass.) 87 , Pattison *v.* Yuba; 13 Cala., 175 ; Wynn *v.* Macon, 21 Ga., 275.

2. It is objected that the road, to aid which the bonds were issued, was not within the State. While it is true that the general laws of the State authorise the issue of bonds to aid works within its borders, yet the special act attached to the certificate in terms authorises the issue of these very bonds to aid this very road outside the State. And it was within the competency of the Legislature to authorise the county to issue such bonds for that purpose.

Gilpecke *v.* Dubuque, 1 Wall., 175, was a case of bonds issued to aid a railroad which did not run to the City of Dubuque.

Walker *v.* Cincinnati, 21 Ohio State, 14, was a case of bonds issued to aid a railroad which was not within the State of Ohio. The opinion is very elaborate, and

the case one of the latest. See also White *v.* The Railroad Co., 14 Barb., 559 ; Copes *v.* Charleston, 10 Rich. (Law) S. C., 491.

3. It is further objected that the act is invalid because it donates the bonds, and is, therefore, not within the cases of subscriptions to stock. But the distinction is immaterial, as held in Stewart *v.* The Supervisors, 30 Iowa, 9 ; Augusta Bank *v.* Augusta, 49 Me., 507 ; The Chicago, etc., Railroad Co. *v.* Smith, in the Illinois Supreme Court, not reported.

The case of Rogers *v.* Burlington, 654, was of bonds issued directly to the Railroad Company as a loan, between which and a donation there is no substantial difference.

4. In fact, it may be said of all these objections, that it is clear that if the legislature is not prohibited by the constitution from authorising municipalities to aid the building of a railroad, and it has exercised its power to grant such authority, the mode and the extent of its exercise rests in its descretion. It may authorise aid to the road by taking stock in it or by loaning to it its money or its credit, or it may make a gift outright ; the road may be within its limits or beyond them, or beyond the State, and the sense of the people on the expediency of aiding the enterprise may be taken or the determination of that question intrusted to their officers.

There is nothing in this case to distinguish it from

the multitude of cases of municipal bonds issued in aid of railroads.

Fifth Point.

There is another view to be taken of the questions certified here. If they are answered in the negative the bonds will be held absolutely void in whose hands soever they may be. The questions go to the authority to issue the bonds. This Court has said too many times that "when a corporation has power under any circumstances to issue negotiable securities the bona fide holder has a right to presume they were issued under the circumstances which give the requisite authority, and they are no more liable to be impeached for any infirmity in the hands of such a holder than any other commercial paper." Mr. Justice Swayne in Gilpecke *v* Dubuque, 1 Wall., 203.

Now, if, on this certificate we may look into the agreed statement of facts, we find that this plaintiff is a bona fide holder, (see paragraph) and the legislation of the State estops the county from alleging want of consideration. Sec. 2 of the act annexed to the certificate provides that the bonds to be issued under it shall be governed by the terms and conditions of the general act passed on the same day. Sec. 6 of that act provides a county shall be estopped to deny the consideration of its bonds.

If, in the face of this legislation, the Court should answer the questions certified in the negative, it would affirm the invalidity of the bonds in the hands of a

bona fide holder, and compel the Circuit Court to enter judgment against him

J. M. WOOLWORTH,
of Counsel for Plaintiff.

The acts referred to above are as follows:

Revised Statutes, page 40.

SEC. 19. The said commissioners shall have power to submit to the people of the county, at any regular or special election, the question whether the county will borrow money to aid in the construction of public buildings, the question whether the county will aid or construct any road or bridge, or to submit to the people of the county any question involving an extraordinary outlay of money by the county; and said commissioners may aid any enterprise designed for the benefit of the county as aforesaid, whenever a majority of the people thereof shall be in favor of the proposition, as provided in this section.

SEC. 21. The mode of submitting questions to the people, contemplated by the last two sections, shall be the following: The whole question, including the sum desired to be raised, or the amount of the tax desired to be levied, or the rate per annum, and the whole regulation, including the time of its taking effect, or having operation, if it be of a nature to be set forth, and the penalty of its violation, if there be one, is to be published at least four weeks in some newspaper published in the county. If there be no such newspaper, the publication is to be made by being posted up in at least one of the most public places in each election precinct in the county; and in all cases the notices shall name the time when such question will be voted upon, and the form in which the question shall be taken, and a copy of the question submit-

ted shall be posted up at each place of voting during the day of election.

SEC. 22. When the question submitted involves the borrowing or expenditure of money, the proposition of the question must be accompanied by a provision to lay a tax for the payment thereof, in addition to the usual taxes under section sixteen of this chapter; and no vote adopting the question proposed shall be valid, unless it likewise adopt the amount of tax to be levied to meet the liability incurred.

SEC. 23. The rate of tax levied in pursuance of the last four sections of this chapter shall in no case exceed three mills on the dollar of the county valuation in one year. When the object is to borrow money to aid in the erection of public buildings, the rate shall be such as to pay the debt in ten years; when the object is to construct or aid in constructing any road or bridge, the annual rate shall not exceed one mill on a dollar of the valuation; and any special tax or taxes levied in pursuance of this chapter becoming delinquent, shall draw the same rate of interest as ordinary taxes levied in pursuance of the revenue law of this territory.

SEC. 24. The said commissioners, being satisfied that the above requirements have been substantially complied with, and that a majority of the votes cast are in favor of the proposition submitted, shall cause the same to be entered at large upon the book containing the record of their proceedings, and they shall then have power to levy and collect the special tax, in the same manner that the other county taxes are collected. Propositions thus acted upon cannot be rescinded by the board of county commissioners.

SEC. 25. Money raised by the county commissioners, in pursuance of the last six sections, is specially appropriated and constituted a fund, distinct from all others, in the hands of the county treasurer, until the obligation assumed is discharged.

SECTION 1. *Be it enacted by the Legislature of the State of Nebraska*, That any county or city in the State of Nebraska is hereby authorised to issue bonds to aid in the construction of any railroad, or other work of internal improvement, to an amount to be determined by the county commissioners of such county or the city council of such city, not exceeding ten per centum of the assessed valuation of all taxable property in said county or city, *provided* the county commissioners, or city council, shall first submit the question of the issuing of such bonds to a vote of the legal voters of said county or city, in the manner provided by chapter nine of the revised statutes of the State of Nebraska, for submitting to the people of a county the question of borrowing money.

SEC. 2. The proposition of the question must be accompanied by a provision to levy a tax for the payment of the principal and interest of said bonds in addition to the usual taxes, and sufficient to meet the payment of the principal and interest of said bonds, and to continue from year to year until said bonds are paid.

SEC. 3. The proposition shall state the rate of interest such bonds shall draw, and when the principal and interest shall be made payable.

SEC. 4. Upon a majority of the votes cast being in favor of the proposition submitted, the county commissioners, in the case of a county, and the city council, in the case of a city, shall cause the proposition and the result of the vote to be entered upon the records of said county or city, and a notice of its adoption to be published for two successive weeks in any newspaper in said county or city, if there be one, and if not, then without such publication; and shall thereupon issue said bonds which shall be and continue a subsisting debt against such county or city, until they are paid and discharged.

SEC. 5. It shall be the duty of the proper officers of such city or county, to cause to be annually levied, collected and paid to the holder of such bonds a special tax upon all taxable property within said county or city, sufficient to pay the annual interest and finally to pay the principal thereof, which tax, when levied, shall be a lien upon all of the taxable property in said county or city, and shall be collected in the same manner as the ordinary tax of such county or city.

SEC. 6. Any county or city which shall have issued its bonds in pursuance of this act shall be estopped from pleading want of consideration therefor, and the proper officers of such county or city may be compelled, by *mandamus* or otherwise, to levy the tax herein provided to pay the same.

SEC. 7. Any precinct in any organised county of this State, shall have the privilege of voting to aid works of internal improvement, and be entitled to all the privileges conferred upon counties and cities by provisions of this act; and in such case the precinct election shall be governed in the same manner as is provided in this act, so far as the same is applicable, and the county commissioners shall issue special bonds for such precinct, and the tax to pay the same shall be levied upon the property within the bounds of such precinct. Such precinct bonds shall be the same as other bonds, but shall contain a statement showing the special nature of such bonds.

SEC. 8. All bonds heretofore voted and issued by any county or city in this State to aid in the construction of any railroad or other work of internal improvement, are hereby declared to be legal and valid, and a lien upon all of the taxable property in such county or city, notwithstanding any defect or irregularity in the submission of the question to a vote of the people, or in taking the vote, or in the execution of such bonds, and notwithstanding the same may not have been voted upon, executed or issued in conformity with law, and such bonds shall have the same legal validity, and bind-

ing force, as if they had been legally authorised, voted upon and executed; *Provided*, That nothing in this section nor in this act shall be so construed as to legalise or in any way sanction any vote of the people of Nemaha County heretofore had, for the purpose of aiding in the construction of any railroad, nor anything done by the county commissioners of said county, authorising said vote, or anything done by them in consequence of such vote.

SEC. 9. All acts or parts of acts inconsistent with this act are hereby repealed.

SEC. 10. This act shall take effect and be in force from and after its passage.

Approved February 15, 1869.

IN THE

SUPREME COURT

OF THE

UNITED STATES OF AMERICA.

THE CHICAGO, BURLINGTON & QUINCY
RAILROAD COMPANY, *Plaintiff.*
vs.
THE COUNTY OF OTOE, *Defendant.*

ARGUMENT AND BRIEF FOR DEFENDANT.

GILBERT B. SCOFIELD,
Attorney and Counsel for Defendant.

NEBRASKA CITY,
NEBRASKA CITY NEWS PRINT.
1872.

UNITED STATES SUPREME COURT.

FROM THE

DISTRICT OF NEBRASKA.

THE CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, Plaintiff.
vs.
THE COUNTY OF OTOE, Defendant.

MAY IT PLEASE YOUR HONORS:

This is an action brought by the Chicago, Burlington & Quincy Railroad Company against the County of Otoe, in the State of Nebraska, to recover the interest upon certain Bonds amounting to $135,000, claimed to have been issued by the County of Otoe to the Burlington & Missouri River Railroad Company, and by said Company transferred and delivered to the Plaintiff in this action. And the plaintiff seeks to recover judgment against the defendant upon the *coupons* attached to said bonds, as will appear by the petition, as follows:

"Now comes the said plaintiff, the Chicago, Burlington & Quincy Railroad Company, by J. M. Woolworth, its attorney, and complains of the County of Otoe, defendant, and says that the said plaintiff is and for ten years and more last past has been duly incorporated under and by virtue of the laws of the State of Illinois, and in the said State transacts its business and has its principal office and is and during said term has been a citizen of the State of Illinois, and that the said defendant, Otoe County, is a municipal corporation in the State of Nebraska, and is and for ten years last past hath been a citizen of said State.

1st. That on the 1st day of January, 1870, at Nebraska City, in said County, the said defendant made and issued its

certain bond, dated on said day at said place, whereby, for value received, it promised, twenty years from date, to pay to bearer one thousand dollars at the Broadway Bank in the city of New York, with interest payable semi-annually at said bank, at the rate of eight per cent. per annum, according to divers coupons thereto attached, which bond, in order to distinguish it from others of like character, was marked No. 1; that attached thereto was, among others, a certain coupon, bearing date on the day and at the place aforementioned, made by said county, whereby it promised to pay to the bearer thereof forty dollars at said bank on the 1st day of July, 1870, for the interest then and there to be due on said bond, which coupon is in words and figures, as follows:

$40. NEBRASKA CITY, January 1, 1870.

The County of Otoe, in the State of Nebraska, promises to pay to the bearer forty dollars, at Broadway Bank, New York, on the 1st day of July, 1870, being for six months interest on bond No. 1. A. STOUT,

President Board County Commissioners.

GEORGE R. MCCALLUM, Clerk.

That before said coupon by its terms became due and payable, the said bond, together with said coupon, came to and for value became the property of this plaintiff, who thereupon became and has ever since been and still is the true and lawful owner and holder thereof; that when said coupon, by its terms became due and payable, the same was duly presented at the place of payment therein mentioned and payment demanded, but refused because said defendant had not nor did it ever have funds at said place; that the said plaintiff has often and in a friendly manner applied to said defendant, at its Treasury in Nebraska City, in said county, to pay said coupon, but it has refused so to do, notwithstanding it is justly indebted thereon to this plaintiff, in the full sum of forty dollars, with interest from the first day of July, 1870.

(Then follows a similar count for each bond and coupon of the $135,000 of bonds claimed to have been issued by the defendant, as above set forth.)

The defendant answers to the several counts in the petition, as follows:

1st. That whether the plaintiff in this action is a corpora-

tion, duly or legally incorporated under or by virtue of the laws of the State of Illinois, the defendant has no knowledge, except from what is stated in the petition, and therefore denies the same, and also denies the right of such pretended corporation to sue as such in this Court.

2d. The defendant denies that on the 1st day of January, 1870, at Nebraska City, Otoe county, Nebraska, or at any other time or place, it made or issued its bond, whereby for value received, or otherwise, it promised to pay to bearer one thousand dollars at the Broadway Bank in the city of New York, with interest payable semi-annually, at eight per cent. per annum, according to the coupons in the petition said to be thereto attached, and the defendant denies that it made or issued any of the bonds or coupons mentioned and described in the several counts of the said petition, and denies that it promised to pay to bearer the several sums in the several counts of the petition set forth, or any or either of them, with the interest coupons attached to the bonds therein described, or any or either of them; and denies that before said pretended bonds and coupons so claimed to have been issued and delivered by the defendant became due and payable, they became or are now the property of the plaintiff for value, and defendant denies that any of the bonds or coupons mentioned and referred to in the petition were ever lawfully issued or delivered by the defendant to the plaintiff, or to any person or corporation whatever; and defendant denies that it ever undertook or promised to pay to the plaintiff or to bearer the several sums of money claimed in the petition to be due and owing from the defendant upon the coupons therein set forth, or the bonds to which they are averred to have been attached, or any or either of them, or any part thereof.

3d. And the defendant, for further answer, states: that A. Stout, who, it is pretended, signed and issued the bonds and coupons named in the several counts of the plaintiff's petition, as President of the Board of County Commissioners of Otoe County, signed and issued the same, if they were ever signed and issued, without any authority of law, and without the authority of said Board of County Commissioners of said County, first had or obtained for that purpose, and that said pretended bonds and the said pretended coupons, upon which this suit is brought, are not the bonds or the coupons of the defendant, and are wholly null and void.

4th. And the said defendant, for further answer states: that the said A. Stout, who issued the said several bonds and coupons set forth in the several counts of the plaintiff's petition, issued said bonds and coupons to and delivered the same to the Burlington & Missouri River Railroad Company, a corpo-

ration or company known by that name, in the State of Iowa, and that plaintiff received said bonds and coupons from said company: That said bonds and coupons so set forth in the said several counts of the petition were so issued and delivered to said Railroad Company, by said Stout, without any authority of law, and were so issued and delivered voluntarily by said Stout to the said Railroad Company, without any good or valuable consideration whatever, moving to this defendant. That the stockholders or persons who own the franchise and compose and are known and described as the Burlington and Missouri River Railroad Company, and the individuals and stockholders who own and compose and who are the plaintiff, or at least a majority of said companies in number and in interest, are the same and not other or different persons; and the defendant avers that when the plaintiff received said bonds and said coupons, as named in the said several counts in plaintiff's petition, it had full notice that said bonds and coupons had been issued without any authority of law, and wholly without consideration; and defendant further avers that the two several companies being composed of the same individuals as aforesaid, the plaintiffs were in and by the law charged with notice that said bonds and said coupons had been issued without authority and without consideration as aforesaid, and were therefore wholly void, which defendant is ready to verify, and therefore prays judgment, &c.

5th. And, for further answer in this behalf, the defendant states that when said bonds and coupons named and set forth in the said several counts of the plaintiff's petition were delivered to and received by the plaintiff, it was incumbent upon and the duty of the plaintiff to ascertain by what authority and for what consideration and upon what account said bonds and coupons had been and were issued, and whether they were the lawfully authorized bonds and coupons of defendant; and defendant further avers that when the plaintiff took and received said bonds and coupons, it had due notice that said bonds and coupons and each of them had been and were issued, made and delivered without any consideration whatever, and without any authority of law, that they were not in fact, the bonds and coupons of the defendant.

6th. And the defendant, for further answer, states: the plaintiff ought not to recover against it, on or by virtue of the said several coupons set forth in the several counts of plaintiff's petition, because defendant avers that the question whether the bonds and coupons so set forth in said several counts of plaintiff's petition, and upon which this action is brought, should be issued to the said plaintiff, or to the Burlington and

Missouri River Railroad Company, or to any other person or company for any purpose whatever, was never submitted to a vote of the people of Otoe County, as is required by law and the statutes of the State of Nebraska, in such cases made and provided, and no proper or legal vote was ever had or taken thereon by the voters of said county, and no vote adopting or consenting to the amount of tax to be levied and collected to meet the liability to be incurred in consequence of the issuing of the said bonds or coupons mentioned and described in the said several counts of said petition, was ever had or taken, and no such question was ever submitted to the people, inhabitants or voters of the County of Otoe, in the State of Nebraska; wherefore defendant states that said pretended bonds and coupons are each and all absolutely void and of no effect, and for which reason defendant also asks judgment.

7th. And defendant, for further answer to said petition, states that the question whether the said bonds and coupons set forth in the several counts in plaintiff's petition should be issued either to plaintiff or to any other company or person, or for any purpose whatever, was never submitted to a vote of the people or legal voters of said county of Otoe, as is required to be done by the laws of Nebraska, in such case made and provided, and no proper or legal vote was ever had or taken thereon, either by the people or legal voters of said county, and no vote by said people or voters, adopting or consenting to the amount of tax to be levied or collected to meet the liability to be incurred in consequence of the issuing of the said bonds or coupons so set forth in the several counts of said petition or either of them, was ever had or taken, and no such question was ever submitted to the people or voters of said county of Otoe; and the defendant further charges that said bonds and coupons and each of them were thus issued without any authority of law, and without any consideration delivered to the Burlington and Missouri River Railroad Company, and by said company delivered to the plaintiff. That the individuals and stockholders composing said Burlington and Missouri River Railroad Company and the individuals and stockholders composing plaintiff are one and the same individual, or a majority of each are the same and not other or different persons, and at the time that plaintiff so received said bonds and coupons and each of them it had notice and well knew, and was also charged with legal notice of the fact that no vote of the people or voters of said county of Otoe, as is required by law to authorize said bonds or coupons to be issued, had ever been taken or had, and that no such question had ever been submitted to said people or voters; and at said time

said plaintiff well knew that no question had been submitted to or voted upon by said people or voters as to the amount of taxes to be levied to meet the liability to be incurred in consequence of the issuing of said bonds and coupons, and that no vote had been taken thereon by the people or voters of said county of Otoe, as is required by law to authorize the bonds or coupons of said county to be issued, wherefore said bonds and coupons and each and every one of them are wholly void and fraudulent in the hands of plaintiff, and for which cause the defendant also prays for judgment, &c.

8th. And the said defendant, for further answer to the said petition, states that on the 15th day of February, 1869, the Legislature of the State of Nebraska passed or pretended to pass a special act, or what purported to be an act of said Legislature, which was approved by the Governor of the State of Nebraska on said day, which pretended act was entitled "An "Act to authorize the County Commissioners of Otoe County "to issue the bonds of said county to the amount of one hun- "dred and fifty thousand dollars to the Burlington and Mis- "souri River Railroad Company or to any other railroad run- "ning east from Nebraska City," which said act or pretended act is prefaced with a preamble, as follows: "Whereas, the "qualified electors of the county of Otoe and State of Nebras- "ka have heretofore, at an election held for that purpose, au- "thorized the County Commissioners of said county to issue "the bonds of said county in payment of stock to any Rail- "road in Fremont county, Iowa, that would secure to Nebras- "ka City an eastern railroad connection, to the amount of two "hundred thousand dollars, and whereas, but forty thousand "dollars have been issued, &c." which said preamble and the statements therein contained the defendant avers were and are wholly and entirely false and untrue. And the said act further provides that the County Commissioners of Otoe County be "authorized to issue one hundred and fifty thousand dollars "of the bonds of said county to the Burlington and Missouri "River Railroad Company, or to any other Railroad Company "that will secure to Nebraska City a direct Eastern railroad "connection, *as a donation* to said railroad company, on such "terms and conditions as may be imposed by the said County "Commissioners," and the said defendant avers that the said A Stout issued the said bonds named in the said several counts of the petition, and caused the same to purport to be his act, as the President of the said Board of Commissioners, in and for said County of Otoe, and delivered the same to said Burlington and Missouri River Railroad Company, by virtue of the provisions of said special act above set forth, and by no

other or different authority, whatever, and without any consideration, whatever.

And the defendant charges and avers that the said pretended act of the Legislature aforesaid, and all and each of the provisions therein contained, and the issuing and delivery of said bonds and coupons, and each and every one of them are null and void, being in direct violation of the Constitution of the United States, and of the Constitution of the State of Nebraska.

And defendant avers that said bonds and coupons set forth in the several counts in the petition after the same had been thus issued and delivered to said Burlington and Missouri River Railroad Company were by said company delivered to plaintiff, and that the individuals composing the stockholders and persons who compose said Burlington and Missouri River Railroad Company, and the individuals and stockholders and persons who own and compose and constitute the plaintiff or the greater portion thereof are one and the same and not other or different persons, wherefore defendant says the plaintiff ought not to further maintain its said action against the defendant.

9th. And the defendant, for further answer, states that the said several bonds and coupons in the several counts of the petition set forth were procured from the said A. Stout, one of the County Commissioners in and for said Otoe County, by the said Burlington and Missouri River Railroad Company by covin and fraud, and without any good or valuable consideration, whatever, and without any manner of power or authority on the part of said A. Stout to issue or make the same so as to bind the defendant therefor, and for the purpose of cheating and defrauding the taxpayers of Otoe County. And defendant further charges that the said Burlington and Missouri River Railroad Company and the plaintiff are foreign corporations incorporated under and by the laws of other States, and not under and by virtue of the laws of the State of Nebraska; that the plaintiff at the time it received said coupons upon which this suit is brought, had full notice and was charged with notice that said bonds and coupons had been so fraudulently issued, and issued without any consideration; that the donation of said bonds and coupons to such foreign corporation was a direct conversion or an attempt to convert the property of the people of Otoe County, in the State of Nebraska, into the property of said foreign private corporations, and into the property of the individuals composing said corporations, and therefore said bonds and coupons are unconstitutional and absolutely void, wherefore defendant also prays judgment.

10th. And the defendant, for further answer, denies each and every allegation and averment in the petition contained not hereinbefore expressly admitted.

Wherefore, by reason of the premises and the said several defenses to the said petition herein made and set forth, the defendant prays judgment and that this cause be dismissed, and that it have judgemnt for its costs in this behalf expended.

To the answer the plaintiff filed a sufficient replication.

The parties have stipulated as follows:

1. That the County Clerk of Otoe County, caused to be published a notice in the following words:

> "In pursuance of the authority in me vested by law, I hereby call a meeting of the Commissioners of Otoe County, to be held at their usual place of meeting in Nebraska City, of said County, on Saturday, the 24th day of February, A. D. 1866, to take into consideration the question of submitting to the people of said County, the issuance of the bonds of said county, not exceeding $200,000 in amount, to be used in procuring to said County an eastern railroad connection."
>
> (Signed,) ELISHA BENNETT, Co. Clerk.

2. In pursuance of said notice, the County Commissioners met and ordered an election accordingly, to be held on the 17th day of March, 1866; and said election was held on said day, and at the same 1,362 votes were cast in favor of said proposition, and 201 votes were cast against the same. The order of the said Commissioners for this election was as follows:

> "It is ordered that an election be held on the 17th day of March, 1866, in and throughout the County of Otoe, N T, for the purpose of ascertaining whether the Commissioners of Otoe County shall issue bonds not to exceed $200,000 for the purpose of securing an eastern railroad connection for Nebraska City, N. T."

3. The Council Bluffs and St. Joseph Railroad Company built a railroad from Council Bluffs, in Iowa, to St. Joseph in Missouri, near Nebraska City, and by order of the County Commissioners, made December 13, 1866, Forty Thousand Dollars of the Bonds of said county, so as aforesaid voted for, were on or about said day issued to it, and coupons thereof were duly paid up to commencement of this suit; said bonds were issued to secure an eastern railroad connection and the same was secured by way of St. Joseph and by way of Council Bluffs.

4. On the 15th day of February, 1869, the Legislature passed an Act entitled "An act to authorize the County Commission-

ers of Otoe County to issue the Bonds of said County to the amount of one hundred and fifty thousand dollars to the Burlington & Missouri River Railroad, or any other railroad running east from Nebraska City," which will be found on page 260 of the laws of the 5th session—the draft of which was drawn by the Attorney of said Burlington and Missouri River Railroad company, and said Act is made a part of this stipulation.

5. That on the 23d day of July, 1869, the Board of County Commissioners of said county passed a resolution, a copy o which is hereto annexed, marked Exhibit "A," which was duly ratified by the Company.

6. That the said Burlington and Missouri River Railroad company duly made to said county the bond in said resolution mentioned, in that behalf of it required, and within the time in that behalf limited in said resolution, built and has ever since operated said railroad, and thereafter and on the 23d day of July, 1869, said Board of County Commissioners passed a resolution directing the county clerk to de iver to said Railroad company the bonds with the coupons attached, in the pleadings mentioned, which was by him accordingly done on the 27th day of September, 1869. There was no vote of the people other than that above mentioned authorizing the issue of said bonds to said company.

7. The Burlington and Missouri River Railroad Company sold and transferred the said bonds with the coupons attached, for value and before maturity of any of said coupons to said plaintiff; that on and before the first day of June last, at least one person, and since that day three persons have been directors in both said company and plaintiff; but at no time has any person been an officer or a member of the executive committee of both of said companies. A large number of persons are stockholders in both companies.

8. The Burlington & Missouri River Railroad Company is a foreign corporation, incorporated under the laws of the State of Iowa, and the plaintiff is a foreign corporation incorporated under the laws of the State of Illinois.

9. The coupons sued on in this action are the same coupons as are above referred to—payment thereof has been duly demanded and refused. A. Stout was at the day of the date, and the day of the making of said bonds and coupons, a member and acting President of the Board of County Commissioners, and Geo. R. McCallum was Clerk of said county, and their signatures to said bonds and coupons are genuine.

Dated, Omaha, November 10, 1871.

EXHIBIT "A."

Whereas, the legal voters of Otoe County, Nebraska, have heretofore voted two hundred thousand dollars in aid of an eastern railroad connection, to be paid in county bonds of said county, of which amount of bonds there remains unappropriated to exceed one hundred and fifty thousand dollars, and Whereas, the Burlington & Missouri River Railroad company, a corporation in the State of Iowa, upon the conditions hereinafter named, propose to build a railroad from a point at or near Red Oak Junction, in the county of Montgomery and State of Iowa, southwesterly through Fremont county, Iowa, to a point on the Missouri River, in Iowa, opposite Nebraska City, and to the nearest practical point, not exceeding a distance of sixty (60) rods from said river, and to establish a depot at said point opposite Nebraska City, as the western terminus of said road; upon condition that Otoe county, in the State of Nebraska, will donate and give to said company one hundred and fifty thousand dollars in the bonds heretofore referred to: Said bonds eight (8) per cent. per annum, interest payable sem-annually—interest and principal of said bonds to be payable in the city of New York—such Otoe county bonds having twenty years or less to run. Now therefore,

Resolved, by the County Commissioners of Otoe county, in the State of Nebraska, that there is hereby appropriated to said Burlington & Missouri River Railroad Company, one hundred and fifty thousand dollars of the said bonds heretofore voted by said county for the aid to an eastern railroad connection, which bonds shall draw eight per cent. annual interest, payable semi-annually from January 1, 1870, and which bonds shall be duly and legally executed, issued and delivered to the said Railroad Company, within thirty days from the date hereof, upon said railroad company at the same time entering into an agreement, *Written*, with a penalty of three hundred thousand dollars, duly and legally executed by the said Burlington & Missouri River Railroad Company, and signed by the President of the company, with the said Otoe county, that said Railroad company shall, within fifteen months from this date, build the said railroad from a point at or near Red Oak Junction, to said point sixty rods from the Missouri River, opposite said Nebraska City, as above set forth, and shall have the cars running on the whole line of said railroad within said time, and shall operate said railroad as a direct Chicago and through eastern connection from Nebraska City, to and from Chicago. This resolution shall operate as a contract between said Otoe county and said Railroad company, provided, the same shall be accepted by the Attorney of said

road of this date, and subject to ratification of the President of said Railroad company within thirty days from this date, this July 23d, A. D. 1869.

Attest, A. STOUT, } *Commissioners.*
J. J. HOCHSTETTLER, }
Attest,
GEO. R. MCCALLUM, *Clerk.*

BRIEF AND ARGUMENT.

FIRST POINT.

In examining the questions involved in this cause it becomes necessary to enquire, what is the nature, character and force of a constitution, and in considering this branch of the case, shall content myself by referring to decisions pronounced by the highest judicial tribunals in our country.

The court in the case of Vanhorn vs. Dorrance, 2 Dall. 308, says:

> "It is the form of government deleniated by the mighty hand of the people, in which certain fixed principles of fundamental laws are established. * * * It contains the permanent will of the people, and is the supreme law of the land; it is paramount to the power of the Legislature. * * The Constitution is the work or will of the people themselves, in their original, sovereign and unlimited capacity. The constitution fixes limits to the exercise of legislative authority, and prescribes the orbit within which it must move. Whatever may be the case in other countries, yet in this, there can be no doubt that every act of the legislature repugnant to the constitution is absolutely void."

And in Marbury vs. Madison, 1 Cranch 176, it is said:

> "The powers of the Legislature are defined and limited, and that those limits may not be mistaken or forgotten the constitution is written. To what purpose are powers limited, and for what purpose is that limitation committed to writing if those limits may at any time be passed by those intended to be restrained? * * It is a proposition too plain to be contested that the constitution controls any legislative act repugnant to it; or that the Legislature may alter the constitution by any ordinary act. * * An act repugnant to the constitution is void."

And on this subject I also refer to Oakley vs. Aspinwall 3 Comst. 547, 567: Bloodgood vs. Mohawk & Hudson R. R. Co. 18 Wend. 63; Sedg. on Con. Law 468, 493. And from these

authorities, it is clear that a constitution is the paramount law of the land, all legislative authority is subordinate to it, and every legislative act repugnant to it is simply void.

The United States Constitution provides that,

> "The enumeration in the constitution of certain rights shall not be construed to deny or disparage others retained by the people;" and again "that the powers not delegated to the United States by the constitution nor prohibited by it to the States are reserved to the States respectively or to the people."

Under these limitations and reservations in the Federal Constitution it is the well settled doctrine of our country that it confers only delegated legislative powers; and that all other powers are reserved to the States respectively, or to the people:—

> McCulloch vs. State of Maryland, 4 Wheat. 405.

The Constitution of Nebraska like that of the United States contains a enumeration of rights, and then provides that,

> "This enumeration of rights shall not be construed to impair or deny others retained by the people and *all powers not herein delegated remain with the people.*"

It will be seen from the above extracts that the federal constitution says "*the powers not delegated*," while our constitution says "*all powers not herein delegated*," are reserved to the people. Hence we find by the clear import and meaning of the language used in the two instruments, if any difference exists between them, it consists in the fact that the words in that of Nebraska are more emphatic than those in the Federal constitution.

Now under the Nebraska constitution, among the powers delegated are those of levying taxes to defray the expenses of the government—and this includes all departments of the government, whether State or municipal; providing for the organizing and disciplining the militia, regulating the jurisdiction of the courts, and for the protection of the citizen in his life, liberty, reputation and property. And to secure these objects and carry into effect and maintain the essential police affairs and regulations of the government, taxation is not only a delegated power, but it is an element of sovereignty. This is ordinary taxation which the citizen pays in return for the protection secured and guaranteed to him by law; but extraordinary taxation is a materially different thing, and the power to levy such tax under the constitution which reserves to the people "*all powers not herein delegated*," cannot be exercised unless expressly granted.

Is such extraordinary power granted? We find it is authorized to repel invasion, suppress insurrection or to defend the State in time of war, and to defray extraordinary expenses the State may contract, not exceeding in the aggregate fifty thousand dollars.

Under the well settled principles of law, in support of which I need not cite authority, these express enumerated grants of extraordinary powers for the execution of which taxation is an essential attribute, exclude the idea of the exercise of any other such powers, and they must be taken as a significant fact that no other such extraordinary taxation was granted or intended to be granted. And no where in the constitution is found the grant of power authorizing the Legislature to provide by law for a county to loan its credit, to make *donation* of the property of a citizen or levy any tax for such extraordinary purpose. Hence, I submit that there being no such delegated power it essentially follows that all legislative acts authorizing such tax must be without authority and void. If such law can be upheld as a rightful exercise of legislative power, then indeed the reserved rights of the citizen as well as the guarantees of the constitution are all a myth.

The case of Baker vs. City of Cincinnati, 11 Ohio 534, arose under a legislative act authorizing the City Council to grant license, for exhibitions of shows and performances, and "exact or receive such sum or sums of money as the council shall think fit and expedient therefor." The question was whether the payment of such license under protest could be recovered back. It was alleged that it was a tax and inhibited by the constitution. The Court however held that "the charge for a license paid by the plaintiff was not illegally exacted." The only clauses of the constitution to which the attention of the court was directed are the second and fifth sections of Article XII; the second section directs that "laws shall be passed taxing by uniform rule, all moneys, credits, investments on bonds, stocks, joint stock companies, or otherwise; and also all real and personal property, according to its true value in money." And then making some exceptions of property,—the 5th section directs that, "No tax shall be levied, except in pursuance of law; and every law imposing a tax, shall state distinctly the object of the same, to which only it shall be applied." It will be observed that in the second section there is an express grant of power to tax companies and all property, save only that expressly excepted. From a careful examination of this case, I think it is clearly discerned that the court was of opinion that the power to exact money for such license came

within the provision of Article XII, and that if there should be any doubt in this regard, then it rested on the "broader ground that the power to authorize assessments, as distinguished from taxes proper is comprehended, in the general grant of legislative power to the general assembly." In this case it would not be a tax.

It will at once be seen that in this case it was an exertion of power in relation to the police regulations of the government; and was not extraordinary taxation but was simply a police regulation in the administration of the police affairs of the government. And the court says: "Things licensed may be such as should only be permitted under the regulation or supervision of public functionaries. The tax or charge may have reference to such regulations and supervision. Such is the case of exhibitors of shows and performances," and further says that such exhibitions may require additional attention of public officers to prevent disorder and disturbance, and that such burdens increase the number and compensation of officers. Therefore upon a close and careful examination of this case we find that, the construction and the force and effect of such clause as that in our constitution which declares that "*all powers not herein delegated remain with the people*," was not involved in the discussion of the Ohio case; that no such question was raised either in the argument or by the court.

In May vs. Cincinnati, 1 Ohio Stat. p 273, Justice Ramsey says:

> "The power to tax is one of the highest attributes of sovereignty. It involves the right to take the private property of the citizen without his consent, and without other compensation than the promotion of the general good. Such interference with the *natural right* of acquisition and enjoyment guaranteed by the constitution can only be justified when public necessity demands it. Being a sovereign power, it can only be exercised by the General Assembly, when "delegated by the people in the fundamental law;" much less can it be exercised by a municipal corporation without a further unequivocal delegation by the legislative body."

This case arose under the same constitution as did that of Baker vs. City of Cincinnati; and in this case there is a direct certain plain construction of the constitution, holding that the power can only be exercised by the legislature "when delegated by the People in the fundamental law."

If this construction given the case of Baker vs. Cincinnati is the true exposition of the principles involved and determined in that case, it removes any apparent conflict which might seem to exist between the two cases, and hence we find they harmonize.

SECOND POINT.

The Constitution provides that,

> "The property of no person shall be taken for public use without just compensation."

In the discussion of this question, I will observe that the principle is well settled that money is property. This doctrine is distinctly announced in Bradshaw vs City of Omaha, 1 Neb. 16. See People vs. Mayor of Brooklyn 9 Barb. 355; Glover vs. Rowel 2 Stock. N. J. 211; Sweet vs. Hurlburt 51 Barb. 316; 15 B. Munroe 491; 21 Ency. Britt. 37; New Am. Ency. vol. 15, p. 807.

The bonds issued and the tax sought to be taken in the case at bar, are without compensation—a pure *gift* or *donation*. Can private property be taken without compensation for public use? Can it be taken from one citizen without his consent and *donated* to another, or to any public use? I think that every fundamental principle of justice forbids such taking of property, and that the functions of government as applied in every age of civil government is directly opposed to such system of legal robbery.

In an historical examination of the functions of government we find in the philosophy of government, the first fundamental natural right is the right of life, which commences before we are born, and that it is protected both by the natural and civil law; the second natural right is to hold and enjoy the fruits of our bodily and mental labor, and this natural right to own the fruits of our labor, includes all the honest acquisitions of property. It has been truly said by most profound jurists, that what a man obtains by the exertion of his own mind, or his own hand, or both combined, should be his *own;* and this historical examination discovers to us that man in the rudest state of nature was not without some notion of exclusive property. It seems to me that this natural right of property was not only inherent, but was demanded by all the circumstances surrounding the enjoyment and protection of life, for, without it no man could have claimed as his own the fruits of his labor. The fruit plucked by him from the tree might have been snatched from him ere he had tasted it, and the bed he had prepared to rest upon might have been

taken from him ere he had laid his body upon it. Hence, the inevitable wants and common necessities of man in all ages demanded the enjoyment and protection of this natural right. Kent in his Commentaries, vol. 2, page 318, says:

> "To suppose a state of man prior to the existence of any notions of separate property, when all things were common and when men throughout the world, lived without law or government, in innocence and simplicity, is a mere dream of the imagination. * * And in following the migrations of nations, apart from the book of Genesis, human curiosity is unable to penetrate beyond the pages of genuine history; and Homer, Herodotus and Livy carry us back to the confines of fabulous ages. The sense of property is inherent in the human breast, and the gradual enlargement and cultivation of that sense, from its feeble force in the savage state, to its full vigor and maturity among polished nations forms a very instructive portion of the history of civil society. Man was fitted and intended by the author of his being for society and government, and for the acquisition and enjoyment of property. *It is, to speak correctly, the law of his nature.*"

The ancient laws of Europe confiscating stolen goods on conviction of the thief without regard to the right of the real owner, is some evidence of the universal recognition of this natural inherent right of property, and that the functions of government were applied in accordance with this universal principle in the philosophy of government. Indeed it will not be controverted, I presume, that this natural right of private property together with those of life, liberty and reputation have been considered by the wisest statesmen and philosophers of every age as the foundation of all civilization among mankind. This higher law of natural right was recognized by Aristotle when he declared that government pertained to man in his most perfect state and entered into the very constitution of human nature; that man could not strictly be man without it.

Therefore, if we shall say that experience is the guide and expediency the test, in solving the problem of government; and that the proper functions of government are disclosed only by an historical examination of the objects to which they have been applied, then we find I think very clearly in every advance step of mankind from his rudest state of nature to the more polished nations and higher civilization, the functions of government as applied in each step of progress, was to secure

in greater degree these natural rights, and that whether proper restraints and limitations of power are found in constitutional compacts, statutory law, or royal edicts, this higher law of natural right was the sacred shield of protection to the citizen or subject and guaranteed to him the enjoyment of life, liberty and reputation and of acquiring, owning and disposing of property. This appears very clearly to be the fact all along the stream of civil progress and to have been the most important function of government.

In Sweet vs. Hulburt, 51 Barb. 318, it is said that:

> "It conceded that outside of constitutional restrictions the legislature possesses the sovereign power of the state, they did not possess the power to destroy the *natural right* of a citizens, to declare innocence a crime, or on their own violation to take the property of one and give it to another. Inhibition against such acts was unnecessary, because they were inhibited by the higher law of natural right."

In 1 Kent's Com. p 451, it said that:

> "In 1792 the Supreme Court of South Carolina in the case of Bowman vs. Middleton, set aside an act of the colony Legislature as being against *common right* as well as against Magna Charta."

And the judiciary constituted the bulwark of government in the protection and enforcement of these individual rights.

When by parliamentary act the subject was thrown within the iron bolted doors and dungeon cells of Newgate without just cause, the judiciary brought him forth and set him at liberty; if by statute innocence is made a crime, or the inherent rights of the citizen are assailed, or the fruits of his own labor—his property—is attempted to be snatched from him or put in peril, it has alwas been the proper function of government through the power of the judiciary to protect the innocent, uphold those inherent rights and afford proper remedy and security to property.

But again, this higher law of natural right is recognized very fully by our own Constitution, which declares that,

> "All men are born equally free and independent, and have certain inherent rights, among which are life, liberty and the pursuit of happiness. * * That all courts shall be open, and every person for any injury done him in his land, goods, person or reputation shall have remedy by due course of law, and justice administered without denial or delay," and that "the blessings of free government can only be sustained by a firm adherence to justice, moderation, temperance, frugality and virtue, and by *frequent recurrence to fundamental principles.*"

Hence we find in our own constitution, not only a recognition but also the positive declaration of these inherent rights of property, &c., and also of the necessity of an essential adherence to justice and the frequent recurrence to fundamental principles. These rules of government are only declaratory of the natural rights which have always existed as fundamental principles of law and to the maintainance of which we find the functions of government have always been applied. These rules of the social union of mankind I think are not only sustained by an historical examination of the proper functions of government but are also supported by reason and the soundest principles in the philosophy of government.

But it is said that the right of eminent domain contravenes this natural right of property. It will not be doubted that in all well organized and established governments from the earliest period of civil government, by reason of the necessities of mankind this right of eminent domain existed. No one will controvert the fact that the establishment of civil government and the progress to higher civilization required some modification in the use and enjoyment of property under this natural right. It became essential to the well being of the social compact that property should not be used to the injury of others; that good order in the community demanded police regulations andthe enforcement of municipal law, and therefore it became just and equable that all members of the community should aid in the maintainance and execution of the rules of society—and hence, it is not difficult to discover the origin of the power of taxation for the support of government. But, I presume, a fair interpretation of the history of government shows that, until within a recent period, this power was only exerted for the general benefit of the whole State, and only a far as was necessary in the general police regulations of the government for the protection and common advantage of all persons in their social, commercial, agricultural, and political

relations. And in applying the functions of government to these objects, it is assumed that the tenure of property is derived from the governing power. But from the best historical light on this subject, it seems evident that this tenure was originally derived from occupancy or universal consent that man, by virtue of his natural right, should enjoy the fruit of his own labor. But however this may be, in the more recent history of governments, the political theory seems to be adopted that this tenure is derived from the governing power, and it is upon this principle that Judge Daniel in West River Bridge vs. Dix, 6 How. 532, says that:

> "Under every established government the tenure of property is derived mediately or immediately from the sovereign power of the political body, organized in such mode or exerted in such way as the community or state may have thought proper to ordain. It can rest on no other foundation; can have no other guarantee. It is owing to these characteristics only in the original nature of tenure, that appeals can be made to the laws, either for protection or assertion of the rights of property. Upon any other hypothesis the law of property would simply be the law of force."

And again, in the opinion of the learned Judge, he further says that in the exercise of this right, "it should be regulated with reference to the advantage of the whole society," and only to that degree which shall "be deemed commensurate with public necessity." The advantages of society and public needs are here used as reciprocal terms.

In Bloodgood vs. Mohawk & Hudson R. R. Co., 18 Wend. 27, it is said that:

> "The power of taking private property for public purpose, is at best an arbitrary power, and justified only by the law of necessity, and therefore should never be exercised without rendering promptly a just equivalent to the individual sufferer."

And as to the mode of exerting this power in respect to partial objects in Hammett vs. city of Philadelphia, 8 Am. L Reg. 414, it is said that,

> "It becomes a mere question of expediency, of which the legislature are the competent and exclusive judges, and not of right."

But to exert this power of eminent domain for the use and benefit of private persons, private corporations—and I will

hereafter show that all corporations not under the direct and exclusive control of government are private—is of very recent date, and a very great departure from the true philosophy of just government. It cannot be supported by experience as the guide and expediency as the test in the history of governments; but it must be and is placed upon the ground of *policy*. The learned judge, in the opinion last cited does not pretend to place the exercise of this power for the use of private persons, upon "fundamental principle" or natural right, but he rests such exercise of power alone upon *policy*. He says,

> "The whole policy of the country, relative to roads, mills, bridges and canals, rests upon this single power, under which lands have been condemned, and without the exertion of this power, not one of these improvements just mentioned could be constructed."

And it may be proper here to remark that in some States there may seemingly appear a difference of opinion in respect to the application of the right of eminent domain to private objects, upon this ground of "policy;" but as to the main question itself there is no disagreement, for, admitting the right to exert this power in one case for private use, admits the right as to all such objects, and makes the difference of opinion simply one of propriety.

But the recent exertion of this power for the use of private persons or corporations, can hardly be said to be even a settled policy of government, for it is vigorously and with unanswerable argument opposed by many of the ablest jurists of the present age; and this opposition is certain evidence of the recent origin of the policy.

We frequently find judges who sustain this policy make apology for their decisions, and sometimes give alarming pictures of the destructive tendency of the policy. Black C. J. in Sharpless vs. Mayor of Philadelphia, 21 Pa. St., says:

> "If the power exists it will continue to be exerted generally; it will be used under the influence of those who are personally interested, and who do not see or care for the ultimate injury it may bring upon the people at large. Men feel acutely what affects themselves as individuals, and are but slightly influenced by public considerations. What each person wins by the enterprise is all his own, the public losses are shared by thousands. The selfish passion is intensified by the prospect of immediate gain, private speculation becomes ardent, energetic and daring, while public spirit, —cold and timid at best—grows feebler still when danger is remote. Under these circumstances it is easy to see where this extra enterprising spirit will end. It has carried the State to the verge of financial ruin; it has produced revolutions of trade and currency in every commercial country; it is tending now and here to the bankruptcy of cities and counties. * *
> Still this plan of improving the country if unchecked by this court will probably go on until it results in some startling calamity, to rouse the masses of the people."

In Garrard County Court vs. Navigation Co., Supreme Court of Kentucky, 1871, the Judge says:

> "And if the question of power with reference to railroad corporations was altogether a new one, we might, upon very high authority, entertain great doubts and serious hesitations in regard to the practice coming appropriately within the range of municipal powers and duties."

In the State of Iowa, reported in 4 Green 1, the power was sustained by two judges to one opposing—that number composing the entire court. Judge Kinney in his dissenting opinion says:

> "If this property is held by the citizens subject to the will of the majority, and if by that majority it can be taxed, sold and appropriated toward building works of internal improvement, where is the enjoyment, possession and protection guaranteed by this article of the constitution? Is a man protected in the possession of his property when public clamor may at any time demand it, for what a majority may please to call public improvement? Do the people of Iowa hold their land by so feeble a tenure?"

Judge Redfield, the able jurist, who no doubt has examined and studied this subject more profoundly than any other in the country, in his work on Railways, Sec. 230, Note i, says:

> "For ourselves we are free to confess that we never could comprehend the basis upon which so many able jurists in this country have professed to percieve clearly the reason for giving municipal corporations the power to become stock holders in railroad companies. We have always felt that it was one of those cases in jurisprudence where the wish was father to the thought."

I suppose it would be difficult to find in any State a unanimous Supreme Court sustaining this policy. But our constitution forbids the taking of private property for public use without just compensation; and therefore, any legislative act which contravenes this command must evidently be void. This logical conclusion is most emphatically pronounced by the Supreme Court of Nebraska. The Chief Justice in a very able opinion delivered by him in the case of Bradshaw vs. City of Omaha, 1 Neb. 16, says:

> "Of course it is admitted that if the legislature pass an act which takes private property for public use without just compensation, it is unconstitutional, and *must be so declared by the Court.*"

There was no dissent to this ruling, and it emphatically decides as the law of our own State, in positive terms, that such legislative act is unconstitutional, and must be so declared by the Court.

And although we have this question well settled in our State in the above case, yet I will refer to some authorities. In Sweet vs. Hulburt, *supra*, it is held that,

> "No person shall be deprived of his property without due process of law, nor shall private property be taken for public use without just compensation. * * This use specified by the act is not public use, but a *donation*, [identical with the case at bar] to a private company; the pretense is to aid in the construction of a work (railway) which the public may use by paying for the privilege; the act contemplates no compensation for the money."

And the Court held that the legislature had no power, express or implied, to authorize such donation, or taking of property. The same doctrine is held in The People vs. Township Board, 9 Am. Law Reg. 496-7 and 501. The Court says:

> "It scarcely seems necessary to say that what the State as a political community cannot do, it cannot require the inferior municipalities to do. When the case is found to stand entirely outside the domain of taxation, State burdens and township burdens are alike precluded; no township vote and no township majority, however large, can affect the principle; any single individual has a right to insist that the public do not own or control his property for the purpose of donation. The case before us is that of a private corporation demanding a gratuity which has been voted to it in township meeting, upon the assumption that its business operations and facilities will incidentally benefit the township. I do not find that the meeting possessed any inherent authority to pass such vote, or that such authority could have been conferred upon it. The legislature could not confer upon the majority there convened a jurisdiction to measure for the minority the demands upon their gratitude or liberality. As therefore, it appears that the first and most fundamental maxim of taxation is violated in the act in question, it becomes superfluous to consider whether the act would also violate the maxim of apportionment."

And again in Whiting vs. Sheboygan Railway Co., 9 Am. Law Reg. 156, the court says:

> "The question is as to the power of the Legislature to raise money or to authorize it to be raised by taxation for the purpose of donating it to a private corporation."

And in a very able opinion reviewing the whole subject the court very emphatically decides that the Legislature has no such power, and property cannot be so taken; and the judge pronouncing the decision quotes with approval the words of Judge James in Sweet vs. Hulburt, where he says that,

> "If this can be done, it is legal robbery, less respectable than highway robbery, in this, that the perpetrator of the latter assumes the danger and infamy of the act, while this act has the shield of legislative responsibility."

In Vanhorn vs. Dorrance, 2 Dall. 315, it is said that,

> "No just compensation can be money except money. Compensation is a recompense in value, a *quid pro quo*, and must be money."

In 2 Kent Com. 339, it is said that compensation is an essential attendant on the exercise of the power, and that,

> "This principle in American Constitutional jurisprudence is founded on natural equity, and is laid down by jurists as an acknowledged principle of universal law."

In Charles River Bridge vs. Warren Bridge, 11 Peter. 579, Judge McLean, in respect to seizure of private property for public use says:

> "Does not the state constitution which declares that private property shall not be taken for public purposes without compensation afford a safe guarantee to the citizens of the state against the illegal exercise of this power?" that this power "must be exercised in subordination to the provisions of the Constitution of the State. And if it be not so exercised, the judicial authority of the State only, between its own citizens can interpose and prevent the wrong, or repair it in damages. * * * That by the exercise of this power, vested rights are disturbed, and compensation must be made."

In Garrard vs. Village of Newberry, 2 John C. 166, Chancellor Kent says that,

> "To render the exercise of the power valid a fair compensation must in all cases be previously made to the individuals affected, under some equitable assessment to be provided for by law."

And also in Thompson vs. Grand Gulf R. R. Co., 3 How. Miss. 240, it is held that the compensation must precede the seizure of the property for public use. See Rice vs. Turnpike Co. 7 Dana 81; Haight vs. Morris 4, W. C. C. R. 601; Scott vs. Sanford, 19 How. (U. S.) 449; Ten Eycke vs. Delaware & Raritan R. R. Co., 3 Harris 200; Bloodgood vs. Mohawk & Hudson R. R. Co., 18 Wend. 25, 27, 37 and 59.

Again, it is a fundamental principle of our government that no person can be "deprived of life, liberty or property without due process of law." I submit that the true intent and pur-

pose of this fundamental rule of law is, that no person shall be deprived of his property without trial, without the intervention of the judgment of his peers. Now in the exercise of this power of eminent domain upon the ground of policy alone, for the use of private corporations in the condemnation of property, there is uniformly legislative enactment providing for a board of appraisers, or some other kind of court to determine the damages sustained by the citizen. This board must necessarily constitute a *quasi* judicial tribunal, for they may hear evidence; they must inquire and ascertain and assess the amount of damages, and their award is to all intents and purposes a judgment, by which the subject-matter becomes *res judicata* unless an appeal be taken therefrom. And the fact that appeal lies from the determination of the board to the District Court, I think is conclusive of the argument that it is in law a *quasi* judicial tribunal. This kind of proceeding is therefore, at least in some respects, due process of law. But in respect to the issuance of bonds to railroad companies, there is no such process of law; it is simply an expression of the will of the people, uttered by a popular vote. The citizen is deprived of trial—of the judgment of his peers—of due process of law, and he has no rights of appeal, no recourse to any court and no remedy whatever for the injury he suffers. Can such practice be law? Is it possible to conceive upon what principle in the philosophy of government, such practice and injustice can be maintained?

It would then seem a county has no inherent or natural power to contract a debt or issue its bonds which would be binding in law. The county acts through its Commissioners, wholly by virtue of delegated authority, or power, and can exercise no power not plainly granted by the Legislature.

Thomson vs. Lee county, 3d Wallace's U. S. R. 327.

Hence, in order to maintain an action upon such bond or a coupon thereto attached, for the payment of the interest thereon, the ulterior facts made necessary to be performed by the act conferring the power, in order to authorize the exercise of the power, must be alleged in the petition and proved upon the trial. That is to say, if the act of the Legislature requires that a vote of the people shall be obtained approving of the issue of the bonds before the county is authorized to contract the debt or issue the bonds, the full requirements of the statutes must be complied with and it must appear that such vote has been obtained prior to the issue of the bonds.

Rhode vs. Davis, 2 Cart. (Ind) 53.
Foster vs. Coleman, 10 Cal., 278

Statutory provisions, by which counties are made municipal organizations, it seems well settled, are only considered *quasi* corporations.

Van Kirk vs. Clark, 16 S. & R. 289,
Irwin vs. Commisioners, 1 S. & R. 508.
Leyon vs. Adams, 4 S. & R. 443.
Price vs. Sacramento, 6 Cal. 254.
Treadwell vs. Commissioners 10 Ohio (N. S.) 181.
6 Mass., 87; 2 Mass., 544; 7 Mass., 461; 1 Greene, 125; 3 Greene, 131; 9 do 88; 8 Johns, 285; 3 Mumf., 102.

And a grant of powers to such a corporation must be *strictly* construed. When acting under a special power it must act *strictly* on the conditions under which it was given.

Treadwell vs. Commissioners 10 Ohio (N. S.) 183.
Manuel vs. Manuel, 13 do., 458.
See also sections 19, 20, 21 and 22 of the Revised Statutes of Nebraska, pages 40 and 41.

It may, however, be contended that the bonds referred to in the petition were issued by the authority given in two acts passed by the Legislature of Nebraska, both of which acts were approved on the 15th day of February, 1869. The first is entitled, "An act to enable counties, cities and precincts to borrow money on their bonds, or to issue bonds to aid in the construction or completion of works of internal improvement in the State; and to legalize bonds already *issued for that purpose.*"

See page 92, acts 1869.

The second is entitled, "An act to authorize the County Commissioners of Otoe county to issue bonds to the amount of one hundred and fifty thousand dollars to the Burlington and Missouri River Railroad, or any other railroad running East from Nebraska City."

See page 269, acts 1869.

It is insisted that neither of these acts can help the plaintiff in this case. The first named act provides first, for the issuing of bonds in aid of works of internal improvement and for

other purposes, but no such bonds are authorized to issue until the *whole question shall have been submitted to a vote of the legal voters of the county or city, including the tax which is required to be levied to repay the amount of the bonds.* This is to be done in a manner particularly set forth in said act; and a majority of said voters must vote for the investment as well as for the *tax*.

See Revised Statutes of Nebraska, page 40, sec. 19, 20 21, 22, &c.

The petition does not allege and it is not claimed by the plaintiff, that all of these required acts to authorize the issue of the bonds were or have been performed.

The second object of this act was to validate bonds already irregularly issued, and cannot apply to the bonds named in this suit, as the bonds named in the petition were not then issued, but as the pleadings show, were issued January 1, 1870, some time after the passage of said act.

The second act of the Legislature before referred to, is a private act, found among the private acts of the Legislature, and of which the Courts will not take judicial notice. The plaintiff cannot avail himself of the benefit of this act unless it counts upon the special act; and the plaintiff must bring its case within the provisions of the act.

And it will be seen, by reference to the special act, that in the preamble the County Commissioners are authorized "to issue the bonds of said County *in payment for stock to any railroad in Fremont County, Iowa.*" And in section one of said act the Commissioners are authorized "to issue one hundred and fifty thousand dollars of the bonds aforesaid to the Burlington and Missouri River Railroad Company, or any railroad company that will secure to Nebraska City a direct eastern railroad connection, as *a donation to said railroad.*" Section two says, "Said bonds, when so issued, are hereby declared to be binding obligations on said county, and to be governed by the terms and conditions of an act entitled an act to enable counties, cities and precincts to borrow money or to issue bonds to aid in the construction or completion of works of internal improvement *in this State*, and to legalize bonds already issued for such purpose, approved February, 1869.

Can the issuing of $150,000 of the bonds of Otoe County, Nebraska, to the Burlington & Missouri River Railroad Company, to build a railroad in the State o Iowa, be construed in any manner possible to mean they were issued "to aid in the construction and completion of works of internal improvement in this State?" (Nebraska). We think not. It is admitted that the attorney for the B. & M. Railroad Company drew the act to be submitted to the Legislature, and which was passed by it, and we may reasonably infer that it was a scheme concocted by a railroad monopoly to procure the passage of these acts by the Legislature of Nebraska, and surreptitiously get the bonds issued to the B. & M. Railroad Company, and by it transferred to the plaintiff, and then make the plea of innocent purchaser, and thus defraud the people of Otoe County. Why the great anxiety of the B. & M. R. R. Company to transfer the bonds soon after they came into its posession, (the day after,) and why the eagerness of the plaintiff to purchase?

Was the B. & M. R. R. company in embarrassed circumstances or bankrupt, and forced to sell its *donations* from Nebraska, and was the plaintiff rich, and waiting for such opportunities to make it richer? We believe that this transaction will be looked upon with great distrust by the Court.

And further, at least one of the directors was the same in each company, that is, the plaintiff and the B. & M. R. R. Company. How is a transaction of the character of the one shown to the court consummated?

The Board of Directors of the B. & M. R. R. Company agreed to sell, and the Board of Directors of the plaintiff agreed to purchase the bonds in question, upon such terms as they might agree.

At least one person was a director in each company. "A large number of persons are stockholders in both companies." How, then, can it be said the plaintiff received the bonds and coupons without notice of how they were obtained? It would seem that both companies and its officers must have known all about it. The cases cited by the plaintiff's counsel are of a different character from the one in question. Those cases are all where a director or stockholder of a *bank* had notice, and all the business done and transacted by the bank was by its officers within the State where the same was located. In this case the B. & M. R. R. Company is a corporation organized under the laws of the State of Iowa, having its principal office in that State, and the plaintiff is a corporation organized un-

der the laws of Illinois, having its principal office in that State; and we submit that none of the cases cited by plaintiff are in point so far as notice to the plaintiff in this action is concerned. Angell & Ames on Corporations, 4th ed., pages 90, 91, 92, 93, 94, and case, cited Booth vs. Barnum, 9. Com. 286. The law imputes to a person knowledge of a fact of which the exercise of ordinary diligence and prudence must have apprised him. The fact that said companies were organized in different States and some of the officers and members thereof, of both companies, is sufficient to notify both of such a proceeding as the issuing and sale of these bonds in controversy,

Again, if this act was a public act, then the facts necessary to validate the bonds or authorize the Commissioners to issue the same, must be stated in the petition, so that issues could be made thereon by the plea or answer of the defendant.

The act attempts to authorize the County Commissioners of Otoe County to issue bonds *to the Burlington and Missouri River Railroad Company, or any other railroad company that will secure to Nebraska City a direct eastern railroad connection.* The next section provides that the bonds, *when so issued*, shall be binding obligations, &c. If this act is relied on, the petition should show that the bonds were issued to one of the companies named in the act, and in the manner and for the purposes named; stating every fact required in the act of the Legislature to make the bonds binding obligations. The county having no inherent power to issue the bonds, the power must be shown to the Court. The plaintiff simply charges that the county of Otoe executed its bonds, and, for aught that appears, without any authority whatever.

2d. It is insisted by the defendant, that, if the act of the Legislature last referred to was a public act, and if the facts connected therewith had been properly shown, still the plaintiff could not recover, for the reason that the said act attempting to authorize and valide the bonds is in effect an attempt, upon the part of the Legislature, to take the property of the inhabitants of Otoe County and give it to the *citizens of another State*, without the consent of the inhabitants of Otoe County, and without compensation; which is prohibited as well by the fundamental principles of free government as by the Constitution of the United States and of the State of Nebraska.

Wells vs. the city of Weston, 22d Missouri Reports, 384, and authorities cited in that case.

The Constitution of Nebraska is not a mere limitation, but a grant of power. The Legislature does not possess all power not prohibited but only such as is granted.

See Sec. 20 of the 1st article of the Constitution of Nebraska; also Art. 2.

It will not be contended that there is any specific grant of power to the Legislature to pass such an act, nor is it included in the grant of Legislative power.

Taylor vs. Porter, 4th Hill, 140, and cases therein cited.
See also Senator Tracy's opinion in Bloodgood vs. M. & H. R. R. Co. 18th Wendall, 59.
Sweet vs. Hulburt, 51st Barb. s. c. R., 312.

We have assumed that the act of the Legislature last referred to is in effect an act to take the property of one individual and give it to other individuals. We do so because we first contend that to give the money to a railroad company is to appropriate it to a private purpose; and, secondly, we contend that as these bonds were *donated* by the act to a corporation without the State of Nebraska; that such corporation can have no entity or legal existence outside of the State where it is created; but in such case it is only an association of private individuals who use a corporate name.

See Ohio and Mississippi R. R. Company vs. Wheeler, 1st Black's U. S. R., 286.
Bank of Augusta vs. Earl, 13th Peters, 512, and cases cited.

There is not only no grant of power in the Constitution of Nebraska to the Legislature to pass said act, but the passage of said act is not only impliedly but directly prohibited, both by the constitution of the United States and the constitution of Nebraska. It is prohibited by the constitution of the United States by the clauses, that no person shall be deprived "of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation." And it is prohibited by the provision of the constitution of Nebraska, which declares that "The property of no person shall be taken for public use without just compensation therefor." This last clause should be understood or read, that

private property shall only be taken for public use, and then not without just compensation. If it should be understood in any other way, it would become nonsensical. If it is not to be understood as prohibiting the taking of private property for private purposes, it must be because it was considered that such an act would be so repugnant to the very idea of all civil and just government, that it would not only be useless, but absurd to formally prohibit it.

Without such construction the prohibition would be perfectly futile, and, in place of protecting the citizen, it would be a mockery—a sham, for if the Legislature should desire the property of the citizen, it would only be necessary to declare that it should be donated to some private individual, without compensation, who would build a railroad with the money for his own benefit.

See the authorities above referred to.

The power to pass the act in question cannot be derived from the taxing power. The Legislature of a State cannot, under the pretence of the power to levy and collect taxes, by an indirection take the property of one citizen and give it to another, or *donate* the property of a municipal corporation in one State to the citizens of another State. The taking power can only be used for the general purposes of the Government, or for local improvements, the benefits of which are peculiar to the inhabitants of the district or locality to be taxed.

We suppose it will not be contended that the Legislature of Nebraska could create a debt, or cause a debt to be created against the county of Otoe, and collect the money from the inhabitants of said county to repay the same under the taxing power, when the money so raised was not for the local purposes of said county, but for the general purposes of the State.

The question then to be considered is, whether the purposes for which the bonds in question were issued and *donated*, and which bonds must be paid by taxes collected from the inhabitants of said county, was for an improvement which is local in its character, and for the *local benefits* and purposes of the inhabitants of said county, or are the benefits *public*, local, and peculiar to the inhabitants of said county?

We answer that the work is not a public one for which the money is appropriated, but essentially a private purpose, and that neither the purpose or the benefits thereof are either

local or peculiar to the county of Otoe or its inhabitants. The purpose for which this money is *donated* is a private one; the money is given to a railroad company in another State, to construct a railroad in another State for the use and benefit of the stockholders of the railroad company, and in which neither the inhabitants of Otoe county, nor said county as a corporate body, have any manner of interest either as stockholders or otherwise, nor can they use the road in any manner peculiar to them, but if they travel on the road or have goods freighted thereon, they must pay for the same in the same manner as all other persons are compelled to do. The road is not only not situated in said county, but it is in another State, and cannot therefore be considered a public work as to the State of Nebraska or as to the county of Otoe. When the money is collected and paid over to the railroad company it is gone, absolutely gone from the people of Otoe county and the State of Nebraska; neither the people of the county nor the State of Nebraska have any interest in it, nor have they any control over it, in any manner or shape whatever. The case differs in this respect from all other cases which have been adjudicated In other cases, the roads to be constructed were in the State where the money was raised, and the *stock subscribed—and the counties subscribing the stock acquired some interest in the road, as stockholders*, and the Legislature of the State had some power to regulate the manner of using the road, for which reason the Courts say that the benefits to the citizens paying the tax is direct and peculiar, as they hold the stock, no matter of what value, and that the Legislature having some kind of control over the road, the work is in some manner a public one. It is useless now to dispute the principle involved in these decisions, and we need not, so far as this case requires it. The act in question simply *donates* the money to the individuals building the road; the donors get no interest in the road, and the road is in another State, over which the Legislature of Nebraska can have no manner of control. It is simply the undisguised taking of the money of the citizen of one State, and donating it to the citizens of another State, to be used for their private benefit, without his consent.

Are the benefits, if benefits they can be called, to arise from the construction of this railroad local and peculiar to the inhabitants of Otoe County? It has already been shown that they are to have no interest in the road, and that they have no right ever to use it, except as they pay for the use, just as everybody else can use the same.

But it may be said that the construction of this road in Iowa, thus giving the people in Nebraska an eastern railroad connection, the road being constructed from a point in Iowa immediately east of Otoe County, would have a tendency to raise the price of property near the termination of the road, and by bringing the county nearer to an eastern market, would also enhance the price of farm produce, and also offer the people a convenient way to travel eastward. This may all be true, and the erection of a mill or foundry would have the same effect. But these benefits are merely speculative and too remote. The benefits must be some interest in or contract of the thing for which the money is appropriated. And then these benefits would not be local to the county of Otoe. The road is not to touch the county, nor would they be peculiar to the inhabitants of said county. The inhabitants of other counties might be benefitted in the same speculative way, but perhaps not to the same extent.

If this same kind of speculative advantages are sufficient to authorize a local tax to be collected from the citizens of Otoe county, it would be equally competent for a local tax to be collected from the citizen of the most remote counties in the State of Nebraska. For as the price of lands and taxable property, in the supposed case, would be enhanced, that circumstance would tend to lessen the amount of taxes to be paid by the people of this remote county, and they would also travel upon and use the road by paying the regular fare. The benefits, in the last case would be of the same character as those in the first; they would only differ in degree. We insist that it is not the degree of benefits which makes the tax lawful, but that the benefits must be local and direct; that is to say, the county or its inhabitants must have a direct interest in the improvement to be made, either as stockholders or in the use or control of the improvement, which must be peculiar to and yet not be equally enjoyable by all of the citizens of the State. But this subject has been so elaborately considred in some late cases that we will content ourselves with a reference to them without pursuing the subject further. See cases above referred to; also,

Whiting vs. Sheboygan Railroad Co., decided in Wisconsin.
Law Register, New Series, vol. 9, No. 3, page 156.
The People ex rel. the Detroit & Howell Railroad Co.;
Same work, vol. 9, No. 8, page 487, decided in Michigan and cases cited; also,
13th Iowa R., 388; 14th Iowa, 107 and 593; 15th Iowa R., 385, and cases cited.

In the constitution of the State of Nebraska under the subdivision entitled "Schedule," Sec. 1, says:

> "That no inconvenience may arise from the change of "territorial government to a State government, it is "declared that all rights, suits, actions, prosecutions, "judgments, recognizances, claims and contracts, "both as respects persons and bodies corporate "shall continue and be enforced as if no change had "taken place, and all laws now in force shall remain in "force until altered, amended or repealed by the Legis-"lature. *Provided*, wherever the word territory shall "occur it shall be construed to mean State, whenever it "may be necessary in order that such laws may conform "to the State government."

The Bonds were voted by the people of Otoe County March 17, 1866, while Nebraska was a territory, and $40,000 issued to the Council Bluffs and St. Joseph Railroad Company to secure an Eastern Railroad connection, which was done by the way of Council Bluffs and by way of St. Joseph.

Nebraska was admitted into the Union February 9th, 1867, about eleven months after the vote had been taken, and several months after the $40,000 of bonds had been issued, and the object for which the bonds were voted had been attained, and the power to issue any further bonds under the vote then ceased.

It will not be claimed, I presume, or at least urged with earnestness that a county having its corporate existence under a territorial form of government and deriving all the powers conferred upon or given to it from the general government can by any manipulation or State legislation, after the territory has become a State, be allowed to *donate* its bonds in aid of a private corporation out of the State and entirely without its control or jurisdiction. The constitution of the United States does not confer the power upon territories or counties therein

organized under a territorial form of government to issue bonds to aid in works of internal improvement in the territory, much less entirely without it.

In Hepburn vs. Elizry, 2d Cranch, 445, Chief Justice Marshall says:

> "All admit the constitutionality of a territorial government. But neither the District of Columbia nor a territory is *a State*, within the meaning of the constitution."

The general sovereignty existing in the government of the United States over its territories is founded on the constitution which declares that "congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States," but there is nothing that gives the power to the people of a territory to vote bonds in aid of any work of internal improvement within the territory unless granted by act of Congress.

Section 6 of an act entitled "an act to organize the territories of Nebraska and Kansas, reads as follows:

> "That the legislative power of the territory shall exten
> "to all *rightful* subjects of legislation *consistent with*
> "*the constitution of the United States* and the provisions
> "of this act, but no law shall be passed interfering with
> "the primary disposal of the soil, no tax shall be im-
> "posed upon the property of the United States," &c.

But in no part of the organic law of the territory is any power or authority given the people to vote municipal aid to any corporation either within or without the territory. In this case as before stated the bonds in the petition described were voted while Nebraska was yet a territory, but after it becomes a State its Legislature through the machinations of corrupt and designing persons attempts to infuse new life into an already dead and worthless act, or rather to breathe the breath of life into something that never had the semblance of vitality or legal existence. It is a cardinal principle of constitutional law and universally admitted that governments have no powers other than those contained in or conferred by the constitution. A law unauthorized by or outside the constitution is as clearly unconstitutional and void as if it were in direct violation of the express provisions of the constitution. Otherwise there would be no security or stability in government.

Legislatures have discretion, it is true, but there is abundant scope for the exercise of their discretionary powers in the definition and prosecution of those purposes of government which are outlined in the constitution. This subject of bonds has so often been before the courts, it is hardly necessary to continue this argument further, but we believe there has no case precisely similar to this been adjudicated. The Supreme Court of the State of Nebraska has never passed upon the validity of the bonds and this Court is entirely free from any former decision in the State as to the construction of the statute or otherwise under which they were issued, or as to the constitutionality of the pretended curative acts of the Legislature of 1869.

The act of the Legislature in question attempts to authorize the creation of a debt of one hundred and fifty thousand dollars against the inhabitants of the county of Otoe, without their consent, and that the amount is to be *donated to a corporation or railroad in another State*, where neither the people of Otoe county or of the State of Nebraska have any control or interest. It is impossible, in the nature of things, that this should be a public purpose as to the people of Nebraska, in the contemplation of either law or reason. In this way this debt is attempted to be created, and, as is further provided in the act, it is made a lien upon all the property in the county to secure the payment of the debt; and by the first named act of the Legislature, which is made a part of the last, it is provided that the county shall be estopped from pleading the want of consideration to an action upon the bonds. If this can be done by the Legislature, there is no reason perceived why, by the same authority, a debt of one hundred and fifty millions might not be created, and thus, by one bold stroke, transfer or donate the entire property of a county to a private corporation of another State. If the citizen can be robbed of his property in this way, it is certainly not done under the right of eminent domain, for this right can certainly not be exercised or exerted in favor of a work in another State. Nor can it be done under the taxing power, as we think is already shown; and it certainly is not done by due process of law. We feel curious to know by what authority such an enormity could be perpetrated.

We close the argument by reminding the Court that it is provided in the Constitution of Nebraska that "The credit of the State shall never be given or bound in aid of any individual, association or corporation;" and that "The Legislature shall

provide for the organization and incorporation of towns and villages by general laws; and restrict their powers of taxation, assessment, borrowing money, contracting debts and loaning their credit, so as to prevent the abuse of such powers." It is not to be inferred from these wise and prudent provisions of the Constitution that it was intended by the framers of the Constitution to wholly prohibit the Legislature from the creation of a debt against the people of the State in aid of either associations of individuals or corporations, and at the same time to permit the Legislature, *by an indirection*, to accomplish the same thing through and by means of enabling acts to the several counties of the State. By every fair construction, such legislation is inhibited by the Constitution. This consideration is at least of sufficient importance to cause a Court to pause before it would further liberalize the construction of doubtful powers in the Legislature by which the rights and property of the inhabitants are violated. Beekman vs. Saratoga and Schenectady Railroad Company, 2d Am. Railway cases, 503.

We may be met in this case by the argument that the bonds in question being payable to bearer are negotiable instruments, and will pass to and be unaffected by any defense, either legal or equitable, in the hands of innocent purchasers. We know that there are numerous decisions which seem to hold that such bonds are negotiable instruments, and although we may not be able to appreciate the principle upon which the most of these decisions seem to rest, still we need not controvert their authority in this case.

1st. We insist that these bonds, having been issued by the Commissioners of Otoe county without any authority in law to do so, the bonds are wholly and *entirely void*, and that they are not the bonds of the county. The county having no inherent right to issue bonds, and the act of the Legislature by which it is attempted to delegate such power being unconstitutional and void, the bonds are not the bonds of the county, and are just as void in the hands of a purchaser as in the hands of the original parties to the void transaction; and we believe that no decision can be found which goes to the extent of upholding an instrument which is wholly void because it has got into the hands of a purchaser. These are not the bonds of the county, and no amount of manipulation used in passing them from one railroad company to another can give them any vitality.

Aspinwall vs. Commissioners of Davies county, 22d, Howard, 365 to 79; 1st Parsons on contracts, 381.
See Redfield on Railways, 2d edition, p. 596, note 9.
Root vs. Goddard, 3d McLean, 102.
Root vs. Wallace 4, McLean, 8, and cases cited.

2nd. Again, the county having no inherent power to make the bonds, having in such case to act entirely by delegated power, it is like a special agent, can only act within the exact power delegated; and every person who deals in the securities issued under said delegated power is bound to know to what extent the power is conferred, and in such case cannot claim to be an innocent holder.

The plaintiff in this case is bound to know that by law the county has no inherent power to make the bonds sued on. It must therefore hold by special delegated power. The plaintiff is then bound to know that such delegated power exists; and if the power is wanting, they cannot hold as innocent purchasers for value.

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